No. 20201

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RETAIL CLERKS UNION, LOCAL 324, LOCAL 899, LOCAL 1167, LOCAL 1428 and LOCAL 1442, Appellants, -and- RALPH E. KENNEDY, Regional Director, Twenty-First Region of the National Labor Relations Board for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Appellant, vs. FOOD EMPLOYERS COUNCIL, INC., Appellee.	No. 20201

On Appeal From The United States District Court

For The Southern District Of California,

Central Division

BRIEF FOR APPELLANTS, RETAIL CLERKS UNION, LOCALS 324, 899, 1167, 1428 and 1442.

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Appellants,

and

RALPH E. KENNEDY, etc.,

Appellant,

v.

FOOD EMPLOYERS COUNCIL, INC.,

Appellee.

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BRIEF FOR CERTAIN APPELLANTS

JURISDICTIONAL STATEMENT

This is an interlocutory appeal from an Order Granting Temporary Injunction entered on June 25, 1965 by the United States District Court for the Southern District of California, Central Division, restraining and enjoining Appellants from maintaining, giving effect to, or enforcing certain bargaining unit work preservation provisions of the collective bargaining agreement between Appellants and the retail food market Employers, Appellee, and further restraining Appellants and these Employers from arbitrating certain disputes related to or connected with these contractual provisions.

The underlying action was brought by Ralph E. Kennedy, Regional Director of the Twenty-First Region, for and on behalf of the National Labor Relations Board under the authority of Section 10(l) of the Labor-Management Relations Act of 1947, as amended, (29 U.S.C. § 160(l)) based upon allegations that he had reasonable cause to believe that Appellants by their contract, had engaged in acts or conduct in violation of Section 8(e) of said Act.

The District Court having made an interlocutory order granting a temporary injunction, jurisdiction of this Court upon appeal is conferred under the provisions of 28 U.S.C. § 1292 (a)(1).

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the Southern District of California, Central Division granting a Temporary Injunction against Appellants upon a petition filed by the Regional Director of the Twenty-First Region of the National Labor Relations Board on behalf of the Board in which it was alleged that there was reasonable cause to believe that Appellants had engaged in conduct in violation of Section 8(e) of the amended National Labor Relations Act. (R.2).

Section 8(e) of the amended Act makes it an unfair labor practice for an employer and a labor organization to enter into or give effect to a contract by the terms of which the employer agrees to or does cease or refrain from handling, using, selling, transporting or otherwise dealing in the products of another employer or to cease doing business with any other person. The Regional Director contended in his petition below that Article I of the contract between Appellants and the retail food market employers who were members of and represented by the Food Employers Council, Inc., constituted an agreement under which these employers agreed to cease handling or selling the products of and to cease doing business with certain distributors and suppliers unless these distributors, suppliers, (or "rack-jobbers") agreed to become parties to or bound by this contract and their employees to become members of Appellants as a condition to the performance of work within the markets by their employees.

In addition to the fundamental or basic allegations concerning the alleged illegality of this contract (referred to as the "Clerks' Agreement") under Section 8(e), the Regional Director also alleged that Appellant Retail Clerks Union Local 770 had breached a Stipulation To Refrain From Unfair Labor Practices, approved by the District Court and entered in a prior proceeding brought under Section 10(l) involving this same contract, in that this Appellant had sought by action filed in the State Court to compel the food market employers to engage in arbitration of certain disputes arising out of or connected with Article I of the Clerks' Agreement. (R.2; Paras.6, 7, 8 and 9; R.17). Thus, the Regional Director, acting under the provisions of Section 10(l) of the amended Act petitioned the District Court below for a temporary injunction restraining Appellants not only from "maintaining or giving effect" to the disputed provisions of the Clerks' Agreement, but also restraining them from "demanding arbitration of, submitting to arbitration or enforcing" such provisions.

It was the theory of the Regional Director that by the attempt to arbitrate matters arising under Article I of the Clerks' Agreement, Appellant Local 770 was engaged in an effort to enforce the disputed provisions contrary to the Stipulation in the prior case. Thus, the Regional Director sought to restrain all arbitrations related in any way to the disputed contract provisions.

However, following administrative conferences, a new Stipulation was entered into, permitting arbitration of disputes arising under Article I but also providing for safeguards to

protect against violations of the statute through the arbitral proceedings. This Stipulation, executed by all of the parties-litigant in the Section 10(l) proceedings, contained two principal covenants:

First: that Appellants would not maintain, give effect to, or enforce Article I of the Clerks' Agreement insofar as it required employees of distributors or suppliers to become members of Appellants as a condition to performing work in the retail food markets or insofar as it required distributors or suppliers to become parties to or bound by the Clerks' Agreement as a condition precedent to the performance of work within the markets by their employees; and,

Second: that Appellants would not enforce or confirm or attempt to enforce or confirm any arbitration award based upon any provision of Article I of the Clerks' Agreement until or unless such award had been submitted to and approved by the Regional Director as being not repugnant to Section 8(e).

The Stipulation also provided for "automatic" entry of a Temporary Injunction by the District Court in the same terms upon application by the Regional Director in the event of violation thereof.

This Stipulation, by its terms, prohibited Appellants from enforcing those provisions of their contract alleged by the Regional Director to be illegal, but it permitted Appellants to arbitrate disputes connected with or arising out of their contract. Such permission to arbitrate, however, was limited by the agreement

that no award under an arbitration would be implemented or enforced until any such award had been first reviewed by the Regional Director for the purpose of ascertaining whether its enforcement would be itself violative of Section 8(e).

The Regional Director advised the Court that in his view the Stipulation would best effectuate the public policy; urged approval of the Stipulation; and informed the Court that injunctive relief was not sought under these circumstances.

Nevertheless, the District Court, solely upon the objections raised by the Charging-parties, (Opposition - Amer. Research Mrdse. Inst., U.S. Consumer Prod. Co., Wesco Mrdse. Co., R.156; Opposition - Teamsters Union, R. 128) denied approval of the Stipulation (Memorandum, R.168; See Rpter's Trans. on hearing on Motion For Reconsideration, R. 170; pg.48; pg.50) and granted a Temporary Injunction.

In accordance with the order below, petitioner Kennedy then lodged a proposed Temporary Injunction with the District Court on June 17, 1965. (R.201). This proposed order restrained Appellants from maintaining or giving effect to the alleged illegal provisions of their contract and, in addition, specifically restrained them from engaging in the arbitration proceedings of July 5, 1965 or "submitting to arbitration or arbitrating any issue or dispute arising out of" the Clerks' Agreement, including the seven points of dispute in issue between Appellant Local 770 and the Food Employers Council, Respondent below.

Written objections to the proposed order were filed by the Joint Council of Teamsters, a Charging-party, (R.195). These objections were considered and, first, overruled by the District Court, and the Order Granting Temporary Injunction was signed by the Court as prepared by counsel for the Regional Director, on June 24 and entered on June 25, 1965.

Appellants promptly filed Notice of Appeal (R.222; R.224), Designation of Record (R.226; R.230) and Statement of Points (R.228).

Thereafter, however, the District Court again reconsidered its order in the face of the Charging-party Teamster objections, now joined in by the other Charging-parties, and purporting to act under the authority of Rule 60(a) of the Federal Rules of Civil Procedure, issued an "Order Nunc Pro Tunc" (R.199) actually revising and amending Paragraph (c) of the Order Granting Temporary Injunction, so that it now restrained Appellants from "engaging in or carrying on arbitration proceedings now scheduled on or about July 5, 1965, or at any other time submitting to arbitration or arbitrating any issue or dispute arising out of the provisions of Article I of an Agreement dated March 14, 1964 between the Clerks and Employers and others, which are in dispute in proceedings before the National Labor Relations Board, and which pertain to the performance of work within the markets by employees of distributors, suppliers, rack-jobbers, or concessionaires, including but not limited to, the seven points designated to be in dispute in a letter dated March 19, 1965, from the Retail Clerks

Union, Local 770 to the President of the Food Employers Council."

By reason of the fact that Appellant Local 770 had already scheduled its arbitration for July 5, 1965, application was made to this Court for a stay of the injunction, or in the alternative, for an expedited hearing on this appeal, the latter being granted by order of July 2, 1965.

SPECIFICATION OF ERRORS RELIED UPON

1. The Court erred in its refusal to approve the Stipulation offered and recommended by the Regional Director and in granting injunctive relief not sought or requested by the Regional Director.

2. The Court erred in permitting the Charging-parties to substitute themselves as the "principal complainant" in place of the Regional Director and in overruling the administrative judgment of the Regional Director solely on the basis of the objections of the Charging-parties.

3. The Court erred in granting its order restraining Appellants from engaging in arbitrations which the Regional Director did not contend would be in violation of the National Labor Relations Act and which the Regional Director did not assert would constitute reasonable cause to believe would be in violation of the Act.

4. The Court erred in granting its order restraining Appellants from arbitrating issues which could and would be determined without conflict with any of the issues before the National Labor Relations Board upon the complaint of unfair labor practices.

QUESTIONS PRESENTED

1. Where the Regional Director of the National Labor Relations Board recommends approval by the District Court of a Stipulation resolving all of the issues before the Court upon a petition for temporary injunction, is it not error for the District Court to deny approval of the Stipulation and to grant the injunction which the Regional Director does not request?

2. Whether the District Court erred in permitting the objections of the Charging-parties to overcome the administrative judgment of the Regional Director upon the remedy appropriate to effectuate the public purposes of the federal labor law?

3. Whether the District Court acted improperly in restraining arbitration of issues which were not in conflict with the issues before the Board merely by reason of the fact that the contract under which these issues arose is questioned in the Board proceeding?

SUMMARY OF ARGUMENT

Appellants contend upon this appeal that the District Court erred and committed an abuse of discretion in denying approval to the Stipulation offered by the Regional Director and in granting an order for an injunction, upon the urging of the Charging-parties, restraining arbitration of issues arising under their contract, contrary to the judgment of the Regional Director who deemed it appropriate to permit arbitration of such issues provided that any award thereunder be submitted for his review to determine whether such award would be repugnant to Section 8(e) of the Act if enforced.

The District Court permitted the Charging-parties to seize control of the hearing upon the Regional Director's Petition, and adopted their position over the opposition of the Regional Director. Thus, the District Court actually allowed private parties to administer the public policies under the statute and gave no credence to the expertise which the Courts consistently attribute to the Federal agency.

Although the Regional Director had petitioned for an order restraining the pending arbitration between Appellant Local 770 and the Employers, at the time of the hearing he made it perfectly plain that, after a review of all of the circumstances, he felt that Appellants should be permitted to arbitrate, subject to his later review and thus urged the Court not to issue a Temporary Injunction and to approve the Stipulation. Except under the most compelling circumstances not here present, we submit that the

District Court should have accepted the position of the Regional Director and should have denied the injunctive relief that the Regional Director indicated was neither required nor sought.

The arbitration proceedings that were the crux of the argument before the District Court would not on their face have resulted in an arbitration award which would have enforced or implemented the provisions of the contract alleged by the Regional Director to be illegal. The issues in arbitration were matters of dispute solely between the Unions and the Employers, arising out of or resulting from the lack of enforceability of the disputed provisions of the contract. The injunction granted by the District Court unnecessarily and unjustly deprived Appellants of substantial rights concerning matters which were not within the cognizance of the Board.

ARGUMENT

I

THE DISTRICT COURT ERRED IN REFUSING TO APPROVE THE STIPULATION SUBMITTED BY THE PARTIES AND IN GRANTING AN INJUNCTION WHICH WAS NOT SOUGHT BY THE REGIONAL DIRECTOR SOLELY UPON THE OBJECTIONS OF THE CHARGING-PARTIES.

The principal issue before this Court is whether the District Court committed error, and in fact, abused its discretion in refusing to approve the Stipulation To Refrain From Unfair Labor Practices (R.160) offered by the Regional Director and in granting injunctive relief not sought by the Regional Director solely upon the objections made by the Charging-parties.

Article I of Appellants' contract was attacked by the Board as constituting an agreement in violation of Section 8(e) of the National Labor Relations Act. As reflected by the allegations in the Petition for Injunction (R.2) a prior such petition had been filed in 1964 (No. 64-874-PH; (S.D.Cal.)) and the issues were resolved without hearing by a Stipulation To Refrain From Unfair Labor Practices (R.2; Exhibit "F"). The Petition for Injunction involved in this appeal is identical to the 1964 petition, except for the additional allegations that Appellant Local 770 had breached the 1964 Stipulation by the filing of a State Court action to compel arbitration. (R.2; Paras. 6, 7, 8, 9 and 10; Exhibit "H").

The real thrust of this second Section 10(l) proceeding was to restrain the arbitration which was then being sought by Appellant Local 770. By the time of the hearings in the District Court the State Court action to compel arbitration had been dismissed, but a different request for arbitration had been made by Appellant Local 770 and accepted by the Employers. (R.T.27; R.186-Decl.of Arnold; Exhibit "A").

There is no evidence in the entire record, nor did the Regional Director contend, that Appellants had attempted any direct enforcement of the contested provisions of the contract contrary to the 1964 Stipulation. The only matter before the District Court was the question whether the arbitration proceedings under the letter of March 19, 1965, would be inherently violative of Section 8(e) of the Act, or would in any manner infringe upon or overlap the jurisdiction of the Board in its ultimate determination of the legality or illegality of Article I of Appellants' contract.

Following the filing of the second petition for injunction by the Regional Director, and after administrative discussions with the General Counsel concerning the scope of the relief requested in the Section 10(l) proceeding, an agreement was reached between the Regional Director, the Respondent Employers and Food Employers Council, and all of the Respondent Unions upon the terms of a new Stipulation To Refrain From Unfair Labor Practices. (R.160). This Stipulation, as filed for approval of the District Court, plainly disposed of all of the issues before the Court under the Petition, including the problem of arbitration proceedings, in a manner

satisfactory to the Regional Director, exercising his discretion in the administration of the public policy under the National Labor Relations Act. A review of this Stipulation will make it clear that the Regional Director finally determined that the proposed arbitration proceedings would not be a violation of public policy per se nor would they infringe upon or conflict with the proceedings before the Board. As an ultimate safeguard, however, Appellants agreed that they would not seek to enforce, implement, or petition to confirm any award of arbitration until after it had been reviewed by the Regional Director and approved by him as being not repugnant to Section 8(e) or to the proceedings then before the Board. As counsel for the Regional Director stated to the Court below, "this is the safeguard that is built into the Stipulation and for this reason there can be no danger of the Act being transgressed or the Act being violated as such. All it does is afford a hearing before another tribunal before /which/ the parties may be heard for their own purposes without violating Section 8(e) of the Act. For this reason we feel that the settlement here, the Stipulation, adequately protects the public interest and yet affords certain rights to the parties to be heard." (R.T.9).

As the record now before this Court demonstrates, the Regional Director was wholly satisfied with the provisions and conditions of this Stipulation and strongly urged the District Court to approve the Stipulation. (See Motion for Reconsideration, R.170; R.T.4-9).

The Charging-parties in the Board proceeding, the Teamsters

Union and the so-called "rack-jobbers", objected strenuously to the request for approval of the Stipulation, and the record makes it abundantly clear that the denial of approval by the District Court was almost entirely based upon these objections.

The District Court in effect gave the Charging-parties status as parties-litigant in the proceedings below. Certainly from this record it cannot be concluded that the participation of the Charging-parties in the proceeding was restricted to aiding the Regional Director but without substituting themselves as the principal complainant (McLeod v. Mechanics Conference Board, (CA-2) 300 F. 2d 237). Regardless of the denial of the District Court that it did so, (R.168), the Court accorded the Charging-parties such complete status as to permit them to control the course of the litigation and in the last analysis, to overcome the administrative expertise of the Board.

In addition to giving great weight to the objections, the Court below indicated that the matter was also controlled by the Petition filed by the Regional Director which had not been formally amended despite the filing of the Stipulation (R.T.26). Appellants suggest that by the filing of the Stipulation, the Regional Director clearly indicated a modification of his allegations in the Petition, i.e.,that the arbitration proceedings gave him reasonable cause to believe that a further violation of the Act was being committed. While the better practice would have been for the Regional Director either to have amended his Petition or, at least, to have moved to vacate his Order To Show Cause upon the

filing of the Stipulation for approval, nevertheless, the record makes it perfectly clear that the Regional Director sought no injunctive relief whatsoever, and stated to the Court his complete satisfaction with the settlement terms offered.

Appellants' position on this appeal is that the District Court committed an abuse of discretion and judicial error in denying approval of the proposed Stipulation. "Stipulations are favored in law; and there is authority for the procedure followed by the Board in the instant labor controversy." (NLRB v. J.L.Hudson, (CA-6, 1943) 135 F. 2d 380; cert.den 320 U.S.740). The settled rule is that "... courts ordinarily look with favor on stipulations designed to simplify, shorten, or settle litigation and save costs to the parties, and such stipulations should be encouraged by the courts rather than discouraged, and enforced by them unless good cause is shown to the contrary..." (83 C.J.S. 3, Stipulations § 2).

Where the parties to a Section 10(1) proceeding before the District Court have entered into a stipulation with the approval of the Regional Director, "to refrain from any of the practices alleged in the petition until the Board's determination", the District Court should exercise its discretion to deny injunctive relief for the reason that the stipulation to refrain from unfair labor practices constitutes clear evidence that there is no reasonable cause to believe that there will be a continuance of the unfair labor practices involved in the Board proceeding. (Madden v. Local 134, IBEW; (DC. ND.Ill.-1960) 187 F. Supp. 698; Alpert v. Steelworkers (DC Mass., 1956) 141 F. Supp. 447).

The question of the legal status of the Charging-parties, whether as intervenors, parties-litigant, or as amici has been debated throughout these proceedings, and although this matter may well have been finally laid to rest by the recent order of this Court on the Motion For Intervention, (July 2, 1965), a highly fundamental issue still remains as to the propriety of the action of the District Court in according overwhelming weight to the position taken by the Charging-parties in opposition to the Regional Director. The question of the standing of the Charging-parties to seek enforcement of orders not sought by the Board or to seek injunctive relief or citations in re contempt not desired by the Board, has most often been raised on motions to intervene or upon direct motions for orders granting the relief desired. The precise question, however, of whether a District Court upon Section 10(l) proceedings should grant relief in excess of that sought by the Regional Director, has seldom been discussed in the cases. It is certainly clear that the Board acts as a public agency in enforcing the mandate of the statute and that private parties have no standing to appeal for relief in Section 10(l) proceedings beyond that sought by the Board (Amalgamated Utilities Workers v. Consolidated Edison, 309 U.S. 261; Douds v. Wine, Liquor & Distillery Workers Union (SD NY) 75 F. Supp. 447; NLRB v. Retail Clerks International Association, (CA-9) 243 F. 2d. 777). It has been held in these proceedings that, "private parties have no rightful place, except as the Court may desire to avail itself of helpful suggestions." (Aluminum Ore Co., v. NLRB (CA-7) 131 F. 2d. 485).

The issue raised upon this appeal was also involved in Phillips v. Mine Workers District 19, (DC EDT, 1963) 218 F. Supp. 103.) There, the Board moved for dissolution of a temporary injunction in the District Court. One of the employers, a charging-party, objected to the dissolution of the injunction, sought to intervene, and requested permission to bring actions for contempt. After an analysis of the right of intervention in view of the Aluminum Ore case, supra, and this Court's decision in the Retail Clerks International Association case, supra, this District Court concluded with the following pertinent observations:

> "The NLRB is charged by Congress with the responsibility for effecting the National Labor policy as set forth in the National Labor Relations Act. The Court does not feel it proper to continue an injunction where the applicant does not want it continued and has stated that it does not expect to seek further enforcement of the order."

Appellants do not contend that the District Court is in all cases required to grant only the relief in the form and manner sought by the Regional Director. We do contend, however, that it is error and an abuse of discretion for the District Court to go beyond the relief requested, unless the most compelling circumstances appear from substantial evidence presented to the Court in the course of the proceedings, from which it could only be concluded that the relief sought by the Regional Director is patently inappropriate and will not prevent the future commission of unfair labor practices.

The mere fact that a petition has been filed under Section 10(1) giving the District Court jurisdiction to issue an injunction, does not deprive the Court of the right to exercise its discretion to deny the injunction, and where the facts show no likelihood of injury to the public or the Charging-parties, there is no need for an injunction. (Douds v. Wine Workers Union (DC SNY, 1948) 75 F. Supp. 447).

While the Act grants the District Court jurisdiction to issue such temporary relief as it deems just and proper, "this language is freighted by the history of equity practices, dating back hundreds of years", and it is clear that the Board is not entitled to an injunction merely because it petitions the Court for one. There must be reasonable cause to believe that injunctive relief is required by the factual situation presented. The necessity for an injunction is to be judged in light of the purpose of the National Labor Relations Act and the traditions of equity practice governing the issuance of injunctions. (Johnston v. Stevens & Co., (DC ENC, 1964) 234 F. Supp. 244 aff'd 341 F. 2d 891).

Certainly the traditional principles of equity would oppose the granting of an injunction where petitioner and respondents have reached an agreement disposing in a proper manner of all of the issues before the Court. The District Court apparently reasoned that, by reason of the filing of the verified petition for an injunction, and upon the strenuous objections of the Charging-parties, it could not approve the Stipulation and, thus, was bound to issue the injunction. This we believe to be wholly incorrect.

Appellants submit that the true rule which should have been followed by the District Court is that, as stated above, in the absence of most compelling circumstances, it is an abuse of discretion for the District Court to prohibit parties from engaging in conduct which the Regional Director does not seek to restrain and against which no Board action will be taken.

> "Section 10(l) is operative only upon the filing of a petition by a Regional Director of the Board. This limitation was imposed in order to restrict the potential involvement of federal courts in labor disputes. For that reason, we do not read it to allow consideration of issues not raised by the Regional Director. To do otherwise, would not only increase the danger of over-involvement on the part of the federal courts, but would also ignore the expertise which Section 10(l) commands us to attribute to the Regional Director. It is his view of the facts and law the district judge is to evaluate in a section 10(l) proceeding. The courts are not free to roam at will over every aspect of a labor dispute upon the request of the charging-party. We are mindful of the fact the statute allows the charging-party to appear by counsel and present relevant testimony. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging-party is free to aid him in the course of the litigation, the charging-party may not substitute itself

as the principal complainant." (McLeod v. Mechanics Conference Board (CA-2, 1962) 300 F. 2d. 237).

The reasoning of the Court of Appeals of the Second Circuit in the McLeod case is directly applicable to this appeal and we believe the rationale should be controlling.

In the instant case, only the Charging-parties opposed approval of the settlement Stipulation. The act of the District Court in granting the injunction and refusing the Stipulation ignored the "expertise" of the Regional Director; denied the "principal role" of the Regional Director in the proceedings; and, permitted the Charging-parties to substitute themselves "as the principal complainants", contrary to the intent and purpose of the Act.

II.

THERE WAS NO REASONABLE CAUSE TO BELIEVE THAT THE PENDING ARBITRATION, OR ANY SIMILAR ARBITRATION, WOULD RESULT IN AN AWARD WHOSE ENFORCEMENT WOULD VIOLATE ANY OF THE PROVISIONS OF THE ACT.

The order of the District Court broadly restrains Appellants from arbitrating any issue arising out of Article I which pertains to the performance of work within the stores by employees of suppliers including the "seven points" of dispute now pending between Appellant Local 770 and the Employers.

The immediate impact of the Court's order was upon Appellant Local 770, in that the order specifically restrained that Appellant from proceeding with an arbitration already scheduled to have commenced on July 5, 1965. (See Affidavit of De Silva, dated June 24, 1965). However, Appellants herein are equally concerned not only by the general restriction against arbitration imposed by the District Court but also by the specific restrictions imposed against the panding Local 770 arbitration. The reason for this position is obvious. Appellants are seriously concerned about the issues raised by Local 770; are desirous of either having these issues resolved in the Local 770 arbitration or; in the alternative, at some future date, possibly asserting the same or substantially similar issues in other arbitral proceedings. Beyond this present concern, Appelants also fear the possible future impact of the broader restrictions against arbitration contained in the injunction.

Perhaps the most compelling reason for reversal of the Court below is the simple fact that under the Court's order Appellants cannot arbitrate any of these issues while, to the contrary, had the District Court approved the Stipulation, Appellants would have been free to arbitrate subject to the final review and approval of the Regional Director. Thus, under the injunction, Appellants are unnecessarily deprived of the benefits of arbitrations that upon analysis would not give rise to concern on the part of the Regional Director.

Amici curiae have cited and undoubtedly will again cite to this Court, the recent decision of the District Court for the Southern District of New York in McLeod v. American Federation of Television and Radio Artists (234 F. Supp. 832, (1964)). Appellants, however, submit that the McLeod case is simply not applicable to the situation involved in this appeal. McLeod also involved a contract alleged to be in violation of Section 8(e) because it contained a provision which appeared to illegally restrict sub-contracting. The arbitration that was restrained by the District Court in McLeod was an arbitration of a grievance alleging a breach by the Employer of the exact sub-contracting restrictions in the collective bargaining agreement which were under attack by the Board.

The situation is quite different in the instant case. The McLeod situation would have arisen in this proceeding only if Appellants alleged in a demand for arbitration that the Food Employers had directly breached the disputed provisions of

Article I.

A review of the "seven points" of dispute raised in the letter of March 19, 1965, will make it quite clear that the issues raised in this arbitration will be completely ancillary to and not in conflict with issues before the Board. Appellant Local 770 was not attempting in any manner to enforce the disputed provisions of Article I of the Clerks' Agreement, but to the contrary, was attempting to have a determination of issues which developed as a result of the Board's attack upon Article I, and as a direct result of Appellants' agreement by Stipulation not to give effect to those disputed provisions.

While we assume that Appellant Local 770 will argue a lack of conflict or overlap between the issues in arbitration and the issues before the Board in detail, because of a companion interest in these and similar issues, some comment is warranted by these Appellants.

The first issue, raised in the March 19 letter, questioned the intent of the parties during negotiations. Contrary to all that has been said, we submit that the question of intent is not tantamount to an effort to enforce or implement. The second and third issues raise a question of whether, as a result of the impossibility of performance by the Employers due to the Board charges, there has been a failure of consideration for which the Unions should be compensated by reason of the fact that the Employers have the benefit of certain economic factors granted to them as a consideration for the now unenforceable provisions of Article I.

The fourth issue is related to the first and the dispute is evidenced by the conflicting contract documents, exhibits in this proceedings.

The last three issues are interrelated. Article XXI of the contract contains a "separability" clause for protection against a ruling of illegality and a connected agreement by the Employers to mutually defend the legality of Article I. Quite obviously, Appellant Local 770 contends that the Employers have not in good faith complied with their agreement to defend, and also asserts that the effect of the Board's action should be interpreted as bringing into operation the re-negotiation right under Paragraph "A" of Article XXI. Finally, there is the question of whether under all of the circumstances the Union has the right to take economic action.

In none of these issues does Appellant Local 770 attempt to obtain an award from an arbitrator which would have any effect upon the Charging-parties in this proceeding. These issues relate solely to controversies or disputes between the parties to the contract which have developed as a result of the pending proceedings before the Board. In no instance under the issues submitted would the arbitrator be empowered to order the Food Employers to cease doing business with any distributor or supplier.

The Court in the McLeod case noted a number of situations in which concurrent jurisdiction between arbitration and the NLRB could arise, and commented that: "in situations similar to those just cited, where there may be an overlap between conduct which

constitutes breach of an agreement and also constitutes an unfair labor practice, on the basis of the Supreme Court decisions, this Court would be loath to interfere with an arbitration of the dispute pursuant to an arbitration clause in the contract."

The reason the Court in McLeod restrained the arbitration is found in the next paragraph of its opinion when it pointed out that it was: "the clause itself, whose breach is the basis of the arbitration", so that the arbitration was itself an unfair labor practice. But, inasmuch as the breach of the disputed provisions of the contract are not in issue in any arbitration sought by Appellants, the District Court acted improperly.

The only basis upon which arbitration may be restrained by a Federal Court is if the award asked of the arbitrator would result in the enforcement of the contractual provisions which the General Counsel seeks to have the Board declare illegal and unenforceable. Where, as in this case, the parties are attempting only to obtain a declaration of their rights resulting from unenforceability of their contract, the courts should not interfere.

Finally, the proposed Stipulation balanced the equities between the parties with far more justice than did the order of the Court below. The injunction forbids any consideration of these issues. But the Regional Director must have realized that it was not the fact of arbitration which would violate public policy under the Act, but only certain arbitral awards themselves. Thus, he concluded that whatever danger might lie in the fact of arbitration would be removed if his review and approval were required

before any such award could be enforced. His only interest was to prevent enforcement of the clauses alleged to be illegal and he was not interested in denying to Appellants the benefit of other legal and contractual rights. Appellants conclude that justice was denied by the order of the District Court granting the Temporary Injunction.

CONCLUSION

The provisions of Section 10(l) of the Act were intended by Congress to establish a procedure under which repetition or continuation of serious unfair labor practices could be restrained in order to preserve the status quo during the period of time required for the administrative proceedings to be brought to a conclusion. Although the Regional Director is required to file his petition for a temporary injunction once he has determined that he has reasonable cause to believe that the Act has been violated, the law does not require that a temporary injunction be granted in all cases.

A balance must always be reached by the Regional Director between the conflicting interests of the various parties who are involved in a Board proceeding, and the Federal Courts should accord the Regional Director wide latitude in the administration of the policies of this statute. Consequently, when after careful analysis of all of the issues and factors, the Regional Director determines that a settlement should be entered into which provides for something less than the injunctive relief originally applied for, Appellants submit that, except under most extreme circumstances, the Federal Courts should defer to the Regional Director.

In the present case, the order of the District Court deprived Appellants of very substantial rights, which the Regional Director had determined, in his administrative wisdom, should be accorded to them.

The Stipulation would have permitted Appellants to arbitrate the issues in dispute, none of which are within the jurisdiction of the Board, none of which will be decided or determined in the Board proceeding, and none of which are of any concern to the Charging-parties. On the other hand, it is, of course, possible that an arbitration award could be rendered, which would overlap or conflict with the statutory issues before the Board. To prevent such conflict from occurring, the Regional Director determined that Appellants should submit any award to him before it was implemented or enforced.

All of this carefully reasoned accommodation of conflicting interests was destroyed by the Temporary Injunction granted by the District Court and Appellants submit that, upon this record, the District Court erred and, in fact, abused its discretion.

WHEREFORE, for the reasons stated herein Appellants respectfully urge that the District Court's order granting temporary injunction be reversed, and that the cause be remanded with direction to approve the Stipulation To Refrain From Unfair Labor Practices.

DATED: July 16, 1965

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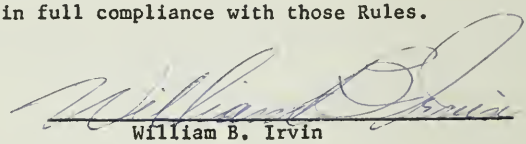
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those Rules.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within brief on behalf of Appellants was served this 20th day of July, 1965, upon each of the following by mailing the same in a stamped, addressed envelope to each at the address indicated:

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